

Regulation (EU) no. 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European account preservation order procedure to facilitate cross-border debt recovery in civil and commercial matters

Regulation (EU) No. 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters (the "Regulation") was published in the Official Journal of the European Union on June 27, 2014.

The Regulation lays down a new EU procedure that will enable assets held in bank accounts to be preserved effectively and quickly in cross-border cases (as defined in the Regulation) in civil and commercial matters (except for those excluded from its scope of application), while granting creditors the possibility of obtaining a protective measure in the form of a European account preservation order preventing the transfer or withdrawal of funds if there is a risk that, without that measure, the subsequent enforcement of the claim will be impeded.

This is an additional and optional procedure for the creditor, who remains free to make use of any other procedure for obtaining an equivalent measure under national law.

The Regulation is structured into the following six chapters: (1) Subject matter and scope; (2) Procedure for obtaining a preservation order; (3) Recognition, enforceability and enforcement of the preservation order; (4) Remedies; (5) General provisions, and (6) Final provisions (entry into force).

Below is a summary of the key features of each chapter of the Regulation.

1. Subject matter and scope

The Regulation lays down a procedure whereby **a creditor may obtain a European account preservation order** ("preservation order" or "order") which prevents the subsequent enforcement of the creditor's claim from being jeopardized through the transfer or withdrawal of funds up to the amount specified in the order which are held by the debtor or on his behalf in a bank account maintained in a Member State (article 1).

The procedure will apply to **pecuniary claims in civil and commercial matters in cross-border cases, whatever the nature of the court or tribunal concerned**, where "cross-border case" means one in which the bank account or accounts to be preserved by the preservation order are maintained in a Member State other than the Member State of the court seized of the application for the preservation order, or the Member State in which the creditor is domiciled.

The procedure will not apply to: revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority; rights in property arising out of a matrimonial relationship or out of a relationship to which the law attributes

comparable effects; wills and succession, including maintenance obligations arising by reason of death; claims against a debtor in relation to whom bankruptcy proceedings, winding-up proceedings, judicial arrangements, arrangements with creditors or analogous proceedings have been commenced; social security and arbitration.

Nor does the procedure apply to bank accounts which are immune from seizure under the law of the Member State in which the account is maintained nor to accounts maintained in connection with the operation of any system as defined in point (a) of article 2 of Directive 98/26/EC, or to bank accounts held by or with central banks when acting in their capacity as monetary authorities (article 2).

The Regulation should apply only to Member States which are bound by it in accordance with the Treaties, and the preservation order provided for in the Regulation should therefore be available only to creditors who are domiciled in those Member States (recital 48).

2. Procedure for obtaining a preservation order

In order to ensure its surprise effect and not deprive the procedure of effectiveness, the Regulation establishes an **ex parte procedure until the relevant preservation order is issued** (recital 15 and article 11), while providing for a series of safeguards in order to prevent abuse of the order and to protect the debtor's rights, notwithstanding the relevant remedies to which the debtor is entitled once the order has been issued.

Following is a brief summary of the main rules of this procedure.

2.1 When the application may be lodged

The creditor may lodge an application for an order in the following situations (article 5):

- (i) **before the creditor initiates proceedings in a Member State against the debtor** on the substance of the matter,¹ **or at any stage during such proceedings** up until the issuing of the judgment or the approval or conclusion of a court settlement;
- (ii) **after the creditor has obtained in a Member State a judgment, court settlement or authentic instrument** which requires the debtor to pay the creditor's claim.

2.2 Jurisdiction

Having regard to when the application is lodged, the type of judgment or document from which it arises or whether consumers or users are involved, the Regulation establishes the **jurisdiction of the court** that will issue the preservation order as follows (article 6):

- (i) where the creditor has not yet obtained a judgment, court settlement or authentic instrument, jurisdiction to issue a preservation order will lie with the courts of the Member State which have jurisdiction to rule on the substance of the matter;

¹ Where the creditor has applied for a preservation order before initiating proceedings on the substance of the matter, he must provide proof of such initiation to the court within 30 days of the date on which he lodged the application or within 14 days of the date of the issue of the order, whichever date is the later. The court may also, at the request of the debtor, extend that time period, for example in order to allow the parties to settle the claim, and will inform the two parties accordingly (article 10).

- (ii) where the creditor has already obtained a judgment or court settlement, jurisdiction will lie with the courts of the Member State in which the judgment was issued or the court settlement was approved or concluded; and
- (iii) where the creditor has obtained an authentic instrument, jurisdiction to issue a preservation order for the claim specified in that instrument will lie with the courts designated for that purpose in the Member State in which that instrument was drawn up.

However, where the debtor is a consumer who has concluded a contract with the creditor for a purpose which can be regarded as being outside the debtor's trade or profession, jurisdiction to issue a preservation order intended to secure a claim relating to that contract will lie only with the courts of the Member State in which the debtor is domiciled.

2.3 Conditions

According to the Regulation, the conditions for issuing a preservation order should strike a balance between the creditor's interest and the debtor's rights, taking into account that, as noted above, it is envisaged as an *ex parte* procedure.

As in the case of protective measures under Spanish law, evidence should be produced of a *prima facie* case, of the need for urgent judicial protection and of a risk that delaying the order could impede enforcement (*periculum in mora*), and in addition, the court may require the creditor to provide security. The Regulation also provides for the liability of the creditor where the creditor is at fault in order to avoid abuse of the preservation order and sets out a number of cases in which there is a rebuttable presumption that such liability exists. The Regulation also provides that Member States may maintain or introduce in their national law other grounds or types of liability or rules on the burden of proof (articles 7, 12 and 13).

Accordingly, the court will issue the order when the creditor has submitted sufficient evidence of an urgent need for a protective measure because there is a real risk that subsequent enforcement may not be possible if it is not adopted (*periculum in mora*) (article 7).

Article 7 also states that where the creditor has not yet obtained in a Member State a judgment, court settlement or authentic instrument requiring the debtor to pay the creditor's claim, the creditor must also submit sufficient evidence to satisfy the court that he is likely to succeed on the substance of his claim (a **prima facie case**).

In addition, as a general rule, before issuing a preservation order **in a case where the creditor has not yet obtained a judgment, court settlement or authentic instrument, the court will require** the creditor to provide **security** for an amount sufficient to prevent abuse of the procedure provided for by the Regulation and to ensure compensation for any damage suffered by the debtor as a result of the order in accordance with the liability rules laid down in the Regulation. The court may dispense with this requirement only if it considers that the provision of security is inappropriate in the circumstances of the case (article 12).

However, where the creditor has already obtained a judgment, court settlement or authentic instrument, **the court may**, before issuing the order, require the creditor to provide security if it considers this necessary and appropriate in the circumstances of the case (article 12).

2.4 Procedure for obtaining a preservation order

- (i) The **application for a preservation order** will be lodged using the form established for the purpose, accompanied by all relevant supporting documents and, where the creditor has already obtained a judgment, court settlement or authentic instrument, by a copy of the judgment, court settlement or authentic instrument which satisfies the conditions necessary to establish its authenticity (article 8).
- (ii) The court will assess the **evidence** provided and its sufficiency in order to analyze the appropriateness of adopting the preservation order and the fulfillment of the conditions. The Regulation also provides that if the court considers that the evidence provided is insufficient, it may, where national law so allows, request the creditor to provide additional documentary evidence. However, the court may, provided that this does not delay the proceedings unduly, also use any other appropriate method of taking evidence available under its national law, such as an oral hearing of the creditor or of his witnesses (article 9).
- (iii) Once the conditions and requirements set out in the Regulation have been examined, the court will **issues its decision on the application without delay and within the time limits stipulated in the Regulation** (article 18), informing the creditor of the decision in accordance with the procedure provided for by the law of the Member State of origin for equivalent national orders. The preservation order will be issued using the form established for the purpose, in the amount justified by the evidence referred to in article 9 of the Regulation and as determined by the law applicable to the underlying claim, and will include, where appropriate, interest and/or costs (articles 15 and 17).

If the application for the preservation order is rejected, the creditor will be entitled to appeal against the decision within 30 days of the date on which he was notified of the decision and the appeal will be conducted without notifying the debtor, as set out in article 11.

3. Recognition, enforceability and enforcement of the preservation order

A preservation order issued in a Member State in accordance with the Regulation will be **recognized in the other Member States** without any special procedure being required and **will be enforceable in the other Member States** without the need for a declaration of enforceability (article 22).

Subject to the provisions of Chapter 3 of the Regulation, the preservation order will be enforced in accordance with the procedures applicable to the enforcement of equivalent national orders in the Member State of enforcement (article 23).

A bank to which a preservation order is addressed will implement it without delay following receipt of the order or, where the law of the Member State of enforcement so provides, of a corresponding instruction to implement the order. The bank will preserve the amount specified in the order either by ensuring that the amount is not transferred or withdrawn from the account, or where national law so provides, by transferring the amount to an account dedicated for preservation purposes (article 24).

Furthermore, by the end of the third working day following the implementation of the preservation order, the bank or other entity responsible for enforcing the order in the Member State of enforcement will issue a **declaration using the declaration form established, indicating whether and to what extent funds in the debtor's account or accounts have been preserved and, if so, on which date the order was implemented** (article 25).

The creditor will be under a duty to take the necessary steps to ensure the **release of any amount which, following the implementation of the preservation order, exceeds the amount specified in the preservation order**: (i) where the order covers several accounts in the same Member State or in different Member States; or (ii) where the order was issued after the implementation of one or more equivalent national orders against the same debtor and aimed at securing the same claim (article 27).

4. Service on the debtor and remedies

By the end of the third working day following receipt of any declaration pursuant to article 25, referred to in the previous point, showing that amounts have been preserved, the issuing court or the creditor, depending on who is responsible for initiating service in the Member State of origin, will serve notice on the debtor or the competent authority, who will serve notice on the debtor, in accordance with article 28 of the Regulation.

The following documents will be served on the debtor: the preservation order; the application for the preservation order and copies of all documents submitted by the creditor to the court in order to obtain the order, accompanied, where necessary, by the translation of such documents (article 28).

The Regulation provides the debtor, once notified, with the possibility of contesting the preservation order or its enforcement (articles 33 and 34) and the preservation order may be revoked or modified on the grounds provided for in the Regulation.

Upon application by the debtor to the competent court of the Member State of origin, **the preservation order will be revoked or, where applicable, modified on the grounds set out in article 33 of the Regulation, namely:**

- (i) the conditions or requirements set out in the Regulation were not met;
- (ii) the order, the declaration pursuant to article 25 and/or the other documents referred to in article 28(5) were not served on the debtor within 14 days of the preservation of his account or accounts;
- (iii) the documents served on the debtor did not meet the language requirements set out in Article 49(1);
- (iv) preserved amounts exceeding the amount of the order were not released;
- (v) the claim the enforcement of which the creditor was seeking to secure by means of the order has been paid in full or in part;
- (vi) a judgment on the substance of the matter has dismissed the claim the enforcement of which the creditor was seeking to secure by means of the order; or
- (vii) the judgment on the substance of the matter, or the court settlement or authentic instrument, the enforcement of which the creditor was seeking to secure by means of the order, has been set aside or, as the case may be, annulled.

In addition, **the enforcement of the preservation order may be contested by the debtor on the grounds set out in article 34**, notwithstanding articles 33 and 35. In such a case, the enforcement of the preservation order will be:

- (i) limited on the ground that certain amounts held in the account should be exempt from seizure in accordance with the law of the Member State of enforcement as provided for in article 31;
- (ii) terminated on the ground that:
 - (a) the account preserved is excluded from the scope of the Regulation;
 - (b) enforcement of the judgment, court settlement or authentic instrument which the creditor was seeking to secure by means of the order has been refused in the Member State of enforcement;
 - (c) the enforceability of the judgment the enforcement of which the creditor was seeking to secure by means of the order has been suspended in the Member State of origin;
 - (d) the cases set out in article 33 apply, except for the first one; or
 - (e) it is manifestly contrary to the public policy of the Member State of enforcement.

In addition, either party may **apply to the court that issued the preservation order for a modification or a revocation of the order on the ground that the circumstances on the basis of which the order was issued have changed**. The court may also, where the law of the Member State of origin so permits, **of its own motion**, modify or revoke the order due to changed circumstances. The creditor may also apply for modification of the enforcement of the preservation order, consisting of an adjustment to the exemption applied in that Member State (article 31, Amounts exempt from preservation) on the ground that other exemptions have already been applied to one or several accounts maintained in one or more other Member States (article 35).

Either party will have the right to appeal against a decision issued pursuant to articles 33, 34 or 35. This appeal will be submitted using the appeal form established by means of implementing acts adopted in accordance with the advisory procedure referred to in article 52(2) (article 37).

Upon application by the debtor, the court that issued the preservation order may order the release of the funds preserved or terminate the enforcement of the preservation order if the debtor provides to that court **security in the amount of the order, or an alternative assurance** in a form acceptable under the law of the Member State in which the court is located and of a value at least equivalent to that amount (article 38).

5. General provisions

The provisions of chapter five ("general provisions") may be summarized as follows:

- (i) **No legalization or other similar formality** will be required in the context of the Regulation (article 40);

- (ii) **Nor does the Regulation require any legal representation** unless, in the context of one of the remedies, such representation is mandatory irrespective of the nationality or domicile of the parties, under the law of the Member State of the court or authority with which the application for a remedy is lodged (article 41);
- (iii) The **court fees** in proceedings to obtain a preservation order or a remedy against an order will not be higher than the fees for obtaining an equivalent national order or a remedy against such a national order (article 42);
- (iv) A bank shall be entitled to seek payment or **reimbursement from the creditor or the debtor of the costs** incurred in implementing a preservation order only where, under the law of the Member State of enforcement, the bank is entitled to such payment or reimbursement in relation to equivalent national orders (article 43);
- (v) **Each Member State will establish a scale or other set of rules in order to determine the fees charged by any authority or other body in the Member State of enforcement** which is involved in the processing or enforcement of a preservation order, or in providing account information, thus ensuring that the fees are set out transparently. In establishing that scale or other set of rules, a Member State may take into account the amount of the order and the complexity involved in processing it. Where applicable, the fees may not be higher than the fees charged in connection with equivalent national orders.
- (vi) Where, in exceptional circumstances, it is not possible for the court or the authority involved to respect the time frames provided for in article 14(7) (Request for the obtaining of account information), article 18 (Time-limits for the decision on the application for a preservation order), article 23(2) (Enforcement of the preservation order), the second subparagraph of article 25(3) (Declaration concerning the preservation of funds), article 28(2), (3) and (6) (Service on the debtor), article 33(3) (Remedies of the debtor against the preservation order) and article 36(4) and (5) (Procedure for remedies pursuant to articles 33, 34 and 35), the court or authority will take the steps required by those provisions as soon as possible.
- (vii) **All procedural issues not specifically dealt with in the Regulation will be governed by the law of the Member State in which the procedure takes place.** The effects of the opening of insolvency proceedings on individual enforcement actions, such as the enforcement of a preservation order, will be governed by the law of the Member State in which the insolvency proceedings have been opened (article 46).
- (viii) Where an application for an order and a preservation order are not in the official language of the Member State in which the debtor is domiciled, they will be accompanied by the relevant **translation or transliteration**. However, the documents submitted to the court by the creditor to obtain the order need not be translated, unless the court decides, exceptionally, that specific documents need to be translated or transliterated in order to enable the debtor to assert his rights. In any event, any documents to be addressed under the Regulation to a court or competent authority may also be in any other official language of the institutions of the Union, if the Member State concerned has indicated that it can accept such other language (article 49).

Lastly, article 50 of the Regulation sets out a list of information that the Member States must provide by July 18, 2016. Articles 51 and 52 state that the Commission, assisted by a committee (within the meaning of Regulation No. 182/2011), will adopt implementing acts establishing and subsequently amending the various forms envisaged in the Regulation, while article 53 deals with the monitoring and review of the Regulation, establishing that the Commission will produce a report on the application of the Regulation by January 18, 2022.

6. Entry into force

The Regulation was published in the Official Journal of the European Union on June 27, 2014 and **entered into force** on the twentieth day following that of its publication.

However, **the Regulation will apply from January 18, 2017**, with the exception of **article 50** – concerning the information that the Member States must provide to the Commission – which will apply from **July 18, 2016**.

The full wording of the Regulation can be found at the following links:

http://www.boe.es/diario_boe/txt.php?id=DOUE-L-2014-81414

<http://eur-lex.europa.eu/legal-content/ES/TXT/?qid=1410177755888&uri=CELEX:32014R0655>

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